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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 607

GREATER BATON ROUGE PORT COMMISSION and CARGILL, INCORPORATED,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, Greater Baton Rouge Port Commission (herein called the "Port") and Cargill, Incorporated (herein called "Cargill") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on February 7, 1961.

Opinion Below.

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, is reported at 287 F. 2d 86. The Report and Order of the Federal

Maritime Commission[1], which was the subject of review in the Court below, is printed in Appendix B hereto.

Jurisdiction.

The judgment of the Fifth Circuit Court of Appeals was entered on February 7, 1961, Appendix C hereto. A Petition for Rehearing was denied on September 14, 1961, Appendix D hereto. The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Questions Presented.

1. Whether, in view of *Rice* v. *Santa Fe Elevator Corporation*, 331 U. S. 218 (1947), and *Cargill, Inc.* v. *Commodity Exchange Commission*, 103 F. Supp. 992 (D. C. D. C. 1952), the activities of a port terminal grain elevator which the Secretary of Agriculture is regulating under a license issued pursuant to the United States Warehouse Act (7 U. S. C. §§241, *et seq.*), may at the same time be regulated by the Commission under the Shipping Act of 1916, as amended (46 U. S. C. §§801, *et seq.*).

2. Whether the Court of Appeals erred in denying Petitioners a rehearing based on an event occurring subsequent to the argument of the appeal, namely, the first penal enforcement of Section 15 of the Shipping Act in the half-century following its enactment—by an action against Cargill based on the Commission's decision herein; and in failing to apply restrictive rather than liberal rules

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[1] On August 12, 1961, pursuant to Reorganization Plan No. 7 (H. Doc. 187, 87th Cong., 1st Sess.), the Federal Maritime Commission succeeded to the regulatory functions of the Federal Maritime Board. The Federal Maritime Commission and its predecessors are hereinafter referred to as the "Commission".

of statutory interpretation in the determination of the issues herein.

Statutes Involved.

The statutes involved, part of Section 1, and Section 15 of the Shipping Act of 1916, as amended, and Section 29 of the United States Warehouse Act, are set out in Appendix E hereto.

Statement.

The Petitioner Port is a regulatory agency of the State of Louisiana having jurisdiction over the Greater Baton Rouge Port area. Petitioner Cargill is a Delaware corporation engaged throughout the country in the business of buying, selling, loading, unloading, receiving, delivering, storing, and handling grain.

In 1955, the Port leased to Cargill a terminal grain elevator located within the Greater Baton Rouge Port area, under a lease agreement designated by the Commission as Agreement 8225. Article 10 of this Agreement provides for the maintenance of standards as to grain storage, handling, rates, etc., required by the United States Warehouse Act, and states that the elevator shall be maintained as a public port facility; that to the extent economically feasible, Cargill will give preference to this grain elevator over the other grain elevators operated by Cargill in the Gulf area; and that the rates charged by Cargill shall be competitive with rates at New Orleans and other Gulf ports. Article 17 of the Agreement gives Cargill a first call on any new elevator facilities in the Port area.

In order to obtain a license under the United States Warehouse Act, Cargill filed with the Secretary of Agri-

culture a copy of Agreement 8225 and other required documents, including a schedule of charges for services. The Secretary issued the license, thereby approving the agreement and placing Cargill under his exclusive jurisdiction as provided in the Warehouse Act.

In 1957, the parties amended Agreement 8225 by adding provisions requiring Cargill to furnish stevedoring service for vessels calling at the elevator, and permitting the conditioning of loading and unloading of vessels on the exclusive use of the stevedoring service provided by Cargill. This amendatory agreement was designated by the Commission as Agreement 8225-1. The Port then filed both Agreement 8225 and Agreement 8225-1 with the Commission for approval under Section 15 of the Shipping Act.[2]

Following the filing of Agreements 8225 and 8225-1 with the Commission, publication of summaries of the two agreements in the Federal Register resulted in one protest, namely, that filed with the Commission by Baton Rouge Marine Contractors, Inc., a Louisiana corporation; and said protest was addressed solely to the stevedoring provisions of Agreement 8225-1. On January 29, 1958, the Commission served a Notice of Investigation and Hearing, ordering a hearing on the protest and an investigation on its own motion of both Agreements 8225 and 8225-1.

Apart from the general jurisdictional issue—i.e., whether or not the Commission as well as the Secretary of Agriculture had jurisdiction over the operations of the elevator—virtually all of the evidence and arguments of counsel in the proceeding before the Commission related to the reasonableness of Agreement 8225-1, inasmuch as the effectuation of that agreement had been suspended pending the determina-

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[2] The statute (Appendix E hereto) requires certain classes of agreements and arrangements between persons subject to the Act to be filed with the Commission for approval prior to being carried out. Such approval creates an exemption from the antitrust laws.

tion of the protest addressed thereto; and no question had been raised by any party at any point in the proceedings as to the reasonableness of Agreement 8225, or the propriety of the Port and Cargill in carrying out that agreement during the pendency of the proceedings, or prior thereto.

Upon the conclusion of the investigation and hearing, a Recommended Decision was issued by the Chief Examiner of the Commission, which found (a) that Agreement 8225 was not required to be filed with and approved by the Commission under Section 15 of the Shipping Act; (b) that Agreement 8225 did not contravene Section 15 of the Shipping Act, if filing and approval were required; (c) that Agreement 8225-1 was required to be filed; and (d) that the latter Agreement should not be approved under the Shipping Act.

On August 6, 1959, the Commission adopted certain of the recommendations of the Chief Examiner and rejected others, finding (a) that the Port and Cargill were persons subject to the jurisdiction of the Commission; (b) that both Agreements 8225 and 8225-1 were required to be filed with and approved by the Commission prior to the carrying out thereof; (c) that Agreement 8225 should be approved; and (d) that Agreement 8225-1 should not be approved. In the course of its decision, the Commission also found that both Petitioners had violated Section 15 of the Shipping Act by carrying out Agreement 8225 prior to its approval.

Petitioners appealed from the Order and Report of the Commission to the United States Court of Appeals for the Fifth Circuit under the Review Act of 1950 (5 U. S. C. §§1031, *et seq.*); and said Report was affirmed by the Court of Appeals in the opinion below.

Subsequent to the submission of briefs and the argument of the appeal to the Court of Appeals, the United States commenced a civil action against Petitioner Cargill alone

in the United States District Court for the Southern District of New York, to recover penalties under Section 15 computed at the rate of $1,000 per day for the period from the date of the execution of Agreement 8225 in September, 1955, to the date of its approval by the Commission in August, 1959. The complaint is based on Cargill's alleged violation of Section 15 in failing to file Agreement 8225 with the Commission and in carrying it out prior to approval.[3] This penalty action was the first commenced by the United States under the Shipping Act since its enactment in 1916, although administrative and judicial findings of violations had been theretofore made (see, for example, *United States Navigation Co., Inc.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932)).

Confronted with a claim for substantial penalties predicated upon the decision of the Commission based in turn upon a record wherein none of the parties nor the Commission took into account the penalty-potential of Section 15 of the Shipping Act, Petitioners sought a rehearing of the decision of the Court below. Petitioners urged that the issues of statutory construction be reconsidered in the light of the subsequent administrative action which transformed a statute administered for 50 years purely as a regulatory statute, into a statute carrying harsh penalties; and accordingly, that the restrictive interpretation of a penal statute, rather than the liberal interpretation of a regulatory statute, should be applied.

Petitioners' application for a rehearing was denied.

Reasons for Granting Writ.

There are two reasons why this petition should be granted.

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[3] A copy of the complaint in said civil action is appended to the Memorandum in Support of the Petition for Rehearing to the Court below.

1. The Exclusive Jurisdiction of the Secretary of Agriculture.

The decision by the Court below permits an unprecedented encroachment upon the exclusive jurisdiction of the Secretary of Agriculture over warehouses licensed under the United States Warehouse Act, and the decision is not only in conflict with the terms of that statute, but with the decisions of this Court in *Rice* v. *Santa Fe Elevator Corp.*, 313 U. S. 218 (1947), and of the United States District Court for the District of Columbia in *Cargill, Inc.* v. *Commodity Exchange Commission*, 103 F. Supp. 992 (1952).

Section 29 of the United States Warehouse Act, 7 U. S. C. §269, provides that "the power, jurisdiction and authority conferred upon the Secretary of Agriculture under this chapter shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect."

State regulation in areas covered by the United States Warehouse Act was excluded in the *Rice* case, *supra*, where this Court, as to grain elevators licensed under the Warehouse Act, declared the principle of "regulation by one agency and by one agency alone"; and in *Cargill, Inc.* v. *Commodity Exchange Commission*, *supra*, that principle was applied to preclude action by a coordinate agency of the Federal government in relation to matters covered by the United States Warehouse Act, the Court stating, "[I]t is simply inconceivable that • • • the Congress intended to hand back any control over the *warehousemen* or the *operation of the warehouse*, and thus establish a duality of control which the Congress had expressly abolished • • •." (103 F. Supp. at p. 997.)

The Court below misconstrued *Cargill* v. *Commodity Exchange Commission*, *supra*, by treating it as another instance of state regulation in an area pre-empted by Fed-

eral authority and therefore distinguishable from coordinate Federal Regulation. But the significant defect in the reasoning of the Court is in its determination that dual regulation by the Secretary of Agriculture and the Commission of arrangements such as those involved in Agreements 8225 and 8225-1 is compatible with the exclusive jurisdiction of the Secretary of Agriculture over warehousing activities. In arriving at this pivotal conclusion (287 F. 2d at p. 90), the Court confused the activities covered by Agreement 8225 (i.e., the basic lease of the grain elevator) with the specific activities covered by Agreement 8225-1 (which involved stevedoring). The significance of "stevedoring" in the evolution of the Court's determination that dual regulation was compatible with the exclusive power of the Secretary of Agriculture in the warehousing realm is shown by that part of the opinion below which narrates Cargill's warehousing activities, i.e., storing, handling and loading out into vessels, and continues—"But, all of this relates to Cargill's contractual obligations—not necessarily to its stevedoring obligations, as such"; and elsewhere, "It seems clear to us that the Secretary of Agriculture is not primarily concerned with Cargill's stevedoring functions and that the Federal Maritime Board is not primarily concerned with Cargill's warehousing functions." (287 F. 2d at pp. 90-91.)

No consideration was given to the nature of the activities or functions covered by Agreement 8225 from the standpoint of their "warehousing" nature as contrasted with the "maritime" nature of the stevedoring arrangement in Agreement 8225-1, for the reason that Agreement 8225 was not actually involved in the proceedings except in an incidental and essentially non-controversial fashion. On the basis of this casual expansion of the jurisdiction of the

Commission into warehousing matters, port warehouses throughout the country are now subject to regulation by the Commission as to all their activities, upon a mere showing that they transact any business in connection with common carriers by water.

We submit therefore that insofar as the Commission purported to construe the Shipping Act so as to assert jurisdiction over Agreement 8225, which dealt with the warehousing functions other than stevedoring, it erroneously invaded an area in which Congress has expressly vested exclusive authority in the Secretary of Agriculture.

2. Failure of the Court Below to Apply Proper Rules of Statutory Construction.

The institution by the United States of the penalty action against Cargill has demonstrated, *first*, that Section 15 of the Shipping Act is now penal in substance as well as in form, and that it must therefore be construed in accordance with the familiar canon requiring strict construction of penal statutes; and, *second*, that the question whether Agreement 8225 is subject to the filing provisions of Section 15 is now one of considerable significance, since it affects an action involving potentially substantial penalties.

Neither of these propositions was true when the appeal herein was argued to the Court of Appeals. At the time of argument, Section 15 was half a century old, and no penal action had ever been brought under its provisions. By virtue of its long history of administrative interpretation, it could properly be regarded as a purely regulatory statute, and not a penal statute. As this Court recently reaffirmed in *Poe* v. *Ullman*, 367 U. S. 497, 502 (1961):

> " 'Deeply embedded traditional ways of carrying out state policy' * * *—or not carrying it out—'are

> often tougher and truer law than the dead words of the written text.' *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369."

The penal character of Section 15 was not discussed by the Court below or by the Commission, nor was it even mentioned by the parties in their briefs, despite the obvious relevance of such a consideration—if it had been known to exist—to the determination of the contested questions of statutory interpretation. The net effect of the bringing of the penalty action after the argument of the appeal below is that a determination of the statutory coverage of Section 15 of the Shipping Act with respect to Agreement 8225 was made by applying rules of broad construction, and that determination, achieved in that manner, was used to assert the right to penalties which otherwise could be collected only after determining the question of statutory coverage by applying rules of strict construction.

Numerous issues—all of them important to the proper administration of the Shipping Act—are affected by the newly-acquired penal character of Section 15 of the Shipping Act. The opinion of the Court of Appeals turns in large part upon the construction of statutory phrases such as "other person subject to the Act", "terminal facilities in connection with a common carrier by water", and "exclusive, preferential, or cooperative working arrangement" (287 F. 2d at pp. 89-90, 92-93). All of this terminology is comparatively general and, accordingly, susceptible of more than one reasonable construction. The institution of the penalty action means that all of these phrases should be given a restrictive construction.

In denying Petitioners a rehearing, the Court of Appeals permitted a determination of the applicability of Section 15 of the Shipping Act to Agreement 8225 on the premise

that this issue was of comparatively little significance and the statute should be liberally construed, whereas, in fact, the issue was of great importance and the statute was required to be narrowly construed[4].

Certiorari should be granted herein because the opinion below presents significant Federal questions regarding the proper interpretation of the Shipping Act and of the Warehouse Act by the Court below. The Court's interpretation is in conflict with a decision of this Court and of the only other Federal Court which has passed on the issue of dual jurisdiction. The opinion below subjects Petitioners, and others licensed under the Warehouse Act, not only to dual and possibly conflicting regulation, but to the retroactive imposition of substantial penalties for failure to anticipate such dual regulation. Moreover, this result, as well as the encroachment upon the exclusive jurisdiction of the Secretary of Agriculture under the Warehouse Act, has been accomplished through the erroneous application of liberal rules of construction to a penal statute.

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[4] Illustrative of the lack of importance attributed in the opinion below to Cargill's failure to file Agreement 8225 with the Commission, is the following language of that opinion:

> "Even though the parties violated the statute, the Board approved of the agreement. If the Board finds no cause to complain of the violation, neither do we." (287 F. 2d 86, 93, fn. 6.)

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated:
December 12, 1961.

Respectfully submitted,

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APPENDIX A.

Opinion Below.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18006

GREATER BATON ROUGE PORT COMMISSION, and CARGILL, INCORPORATED,

Petitioners,

versus

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

Petition to Review Report and Order of the Federal Maritime Board.

(February 7, 1961.)

Before TUTTLE, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The dispute generating this litigation began when Cargill, Inc., a large grain-handling company having an exclusive right to operate a public grain elevator within a port area, by virtue of an agreement with the Greater Baton Rouge Port Commission, attempted, by amendment to the agreement, to control *all* the stevedoring business at the elevator. Petitioners pose jurisdictional problems under the Shipping Act, 46 USCA

§801 *et seq.*, and question the validity of a Report and Order of the Federal Maritime Board.[1] This order, under authority of Section 17 of the Shipping Act empowering the Board to enjoin unjustly discriminatory rates, approves the original agreement between Cargill and the Port Commission. It disapproves the amendment authorizing the restrictive arrangement creating a monopoly over stevedoring activities at the elevator.

I.

Baton Rouge Port Commission, one of the petitioners, is a regulatory agency of the State of Louisiana.[2] Cargill, the other petitioner, is a Delaware corporation engaged throughout the country in the business of buying and selling, loading and unloading, handling, storing and delivering grain.

In 1955 the Port Commission leased to Cargill a grain elevator and wharf on the Mississippi River one mile south of Port Allen, Louisiana, within the Greater Baton Rouge Port area. This lease, Agreement 8225, gives Cargill the exclusive right to operate a public grain elevator within the Port area, and a first option on additional grain storage and handling facilities if the Port Commission should decide to construct any more such facilities. Article 10 of this agreement, a significant provision, states that the grain elevator and wharf shall be maintained as public port facilities; that "to the extent economically feasible [Cargill] will give preference to this grain elevator over the other grain elevators operated by [Cargill] in the Gulf area"; and, that rates shall be on a competitive basis with published rates at New Orleans and other Gulf ports.

In 1957 the parties amended their original lease by adding provisions that Cargill should furnish stevedoring service for vessels calling at the grain elevator, and should condition the loading and unloading of vessels on their

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[1] Under the Review Act of 1950, 5 USCA §1031 *et seq.*

[2] Louisiana Constitution of 1921, Art. VI, Section 29.

using Cargill's stevedoring service exclusively. This amendment is Agreement 8225-1.

The original lease agreement was not filed with the Board for approval. After the lease was amended, Cargill and the Port Commission on April 25, 1957, filed both agreements, 8225 and 8225-1, with the Board for approval under Section 15 of the Shipping Act.

Cargill is licensed under the United States Warehouse Act, 7 USCA §241 *et seq.*, to operate the grain elevator, and has filed copies of the agreements, 8225 and 8225-1, and a schedule of charges with the Secretary of Agriculture. On this peg Cargill hangs its jurisdictional argument.

We note that Cargill's wharf extends over the Mississippi River, and a long ramp runs, on land, from the wharf to the elevator; that the license issued by the Secretary of Agriculture covers the elevator only and makes no reference to the wharf, or, for that matter, to any maritime facilities. But even if the license had covered the wharf, the Board's jurisdiction over the use of the wharf as a marine terminal would be undiminished.

The grain elevator was opened in September, 1955, greatly expanding the facilities of the port of Baton Rouge. Four Gulf stevedoring firms, encouraged by the Port Commission and assured by Cargill that the elevator would not be operated on an exclusive basis but would be open to all stevedores, organized the Baton Rouge Marine Contractors, Incorporated (BARMA) to supply agency and stevedoring services at Baton Rouge. The four firms decided to make this a cooperative effort mainly because of the substantial capital investment required for equipment necessary to engage in stevedoring operations at the grain elevator. In the beginning, BARMA ran into trouble in the purchase of equipment and in the hiring and training of personnel and labor. These troubles were overcome and efficiency improved. By the time of the hearing, BARMA's stevedoring rates were only slightly higher than stevedoring rates charged in New Orleans. Cargill was not satisfied.

From time to time, Cargill complained to BARMA regarding vessel dispatch and turnaround time. Then in August 1956 Cargill decided to enter into the stevedoring business at Baton Rouge. It brought into the area Rogers Terminal and Shipping Corporation, a wholly-owned subsidiary. Cargill notified BARMA that it was no longer welcome at the elevator and that all vessels calling at the elevator would have to employ Rogers as stevedore. BARMA refused to withdraw from the stevedoring business at the elevator. It has continued to operate in competition with Rogers.

In March 1957, with no notice to BARMA and with no inquiry into how Cargill would conduct the stevedoring operation, the Port Commission entered into an exclusive stevedoring arrangement with Cargill embodied in Agreement 8225-1. The reason stated in the Agreement for this action was to integrate the unloading of vessels "into the over-all elevator operation so as to provide a more efficient service." The Board found, however, that BARMA was more efficient than Rogers, notwithstanding the fact that when Rogers started in business it succeeded in hiring some of BARMA's key supervisory personnel. In the proceedings before the Board BARMA filed a protest against the amendment to the Cargill Agreement. In the instant case BARMA intervened.

II.

The Port Commission concedes it is subject to the provisions of the Shipping Act and to the jurisdiction of the Federal Maritime Board. *California* v. *United States*, 1944, 320 U. S. 577, 585, 64 S. Ct. 352, 88 L. Ed. 322. Cargill, relying on its license under Section 29 of the Warehouse Act (7 USCA §241), asserts that this Act vests in the Secretary of Agriculture exclusive jurisdiction over all activities of a licensed warehouseman, including stevedoring, wharfage, and dockage activities; citing *Rice* v. *Santa Fe Elevator Corp.*, 1947, 331 U. S. 218 and *Cargill*,

Inc. v. *Commodity Exchange Commission*, U. S. D. C. D. C. 1952, 103 F. Supp. 992. The Warehouse Act does, as Cargill points out, provide that "the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this Act shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect." 7 USCA §269.

Going first to the Shipping Act,[3] we find that Section 1 defines the term "other person subject to this act" to mean "any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Of course,

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[3] The Shipping Act was entitled: "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes." Act, Sept. 7, 1916, c. 451, 39 Stat. 728. The Maritime Commission was established by Congress to safeguard a special aspect of the national interest by stopping all unjust and unreasonable practices in receiving, handling, storing or delivering property "in connection with a common carrier by water." California *v.* United States, 1943, 320 U. S. 577, 64 S. Ct. 352, 88 L. Ed. 322, reh. den. 321 U. S. 802, 64 S. Ct. 516, 88 L. Ed. 1089. *Cf.* United States Naval Co. *v.* Cunard S. S. Co., 1932, 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408. "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate carriers by land. . . . In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect." United States Naval Co. *v.* Cunard S. S. Co., 1932, 284 U. S. 474, 480-81, 52 S. Ct. 247, 76 L. Ed. 408. "The evil of discrimination was the principal thing aimed at by the [Interstate Commerce] Act, see Louisville & N. R. Co. *v.* United States, 282 U. S. 740, ante, 672, 51 S. Ct. 297, and its language is certainly broad enough to embrace all discrimination of the sort described which it was within the power of Congress to condemn." Merchants Warehouse Co. *v.* United States, 1931, 283 U. S. 501, 512-13, 75 L. Ed. 1227, 51 S. Ct. 505.

effective regulation of common carriage would necessarily involve some supervision over auxiliary services. Cargill comes within the Act, since it furnishes "warehouse, wharfage, dock, warehouse or other terminal facilities" at the Baton Rouge grain elevator "in connection" with common carriage by water.

Going now to the Warehouse Act,[4] we find that it does not vest jurisdiction over wharves, docks, and stevedoring in the Secretary of Agriculture. By definition the Act applies to the *storage* of agricultural products, not to maritime activities and facilities. Thus, 7 USCA §242 defines the term "warehouse" to mean "every building, structure, or other protected inclosure in which any agricultural product is or may be stored for interstate or foreign commerce, or, if located within any place under the exclusive jurisdiction of the United States, in which any

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[4] "The basic program reflected in the [Warehouse] Act was described in HR Rep. No. 60, 64th Cong., 1st Sess., p. 1, as follows: 'The outbreak of the European war emphasized the fact that the farm marketing machinery of this country is seriously weak, insufficient, and inadequate—a condition which already had been more or less recognized by students of farm economics. From a very thorough study of our system of marketing there will appear: (1) A lack of adequate storage facilities; (2) a lack of proper control and regulation of such storage systems as exist; (3) an absence of uniformity in their methods of operation and the form of receipts issued; (4) a multiplicity of standards for grading and classification, or in some cases an entire absence of such standards for grading and classification; (5) a lack of disinterested graders, classifiers, and weighers; (6) a lack of proper relationship between the storage and banking systems of the country. The inauguration under this bill of a permissive system of warehouses licensed and bonded under authority of the Federal Government for the storage of staple and nonperishable agricultural products upon which uniform receipts may be issued, the weights and grades of the products specified therein having been previously determined by licensed weighers and graders in accordance with Government standards, would go far in the direction of standardizing warehouse construction, storage conditions, insurance, accounting, financing, and the handling and marketing of farm products.'" Rice v. Santa Fe Elevator Corp., 1947, 331 U. S. 218, . . . S. Ct. . . ., 91 L. Ed. 1447, fn. 13.

agricultural product is or may be stored." The primary concern of the Act is to establish standards for the safe storing of agricultural products in federally licensed warehouses. It seems clear to us that the Secretary of Agriculture is not primarily concerned with Cargill's stevedoring functions and that the Federal Maritime Board is not primarily concerned with Cargill's warehousing functions.

Here, although many of Cargill's facilities and services are of a maritime nature, some pertain to the warehousing business. A geographical line cannot be drawn separating the two. Thus, "loading out" is considered a part of the business of a grain elevator. The loading gallery, surge hoppers, and chutes are part of the premises of the entire grain elevator and are covered by the license issued by the Secretary of Agriculture. Where would the jurisdiction of the Secretary of Agriculture cease and the jurisdiction of the Federal Maritime Board begin? Somewhere along the loading gallery? Complicating the problem, Cargill is responsible for the quality of grain even after it is stowed by the stevedores aboard the ship. The grain must be determined by laboratory inspection to be of equal quality to the grain called for by the warehouse receipts surrendered for loading. The purpose of this inspection is to correct any mistakes resulting from the delivery of the wrong kind of grain through the spout. But, all of this relates to Cargill's contractual obligations—not necessarily to its stevedoring obligations, as such. If Cargill fails to deliver the proper grain, it must rectify the error. The nature of Cargill's business, therefore, subjects it to the jurisdiction of the Secretary of Agriculture; but no inference can be drawn from this fact that would oust the Federal Maritime Board from its control over Cargill. The Secretary of Agriculture, it should be noted, is not appearing in the case to assert any jurisdiction.

Under the original United States Warehouse Act, enacted in 1916, federal regulation was subservient to state regulation. Section 29 of the original act provided that

"nothing in this act shall be construed to conflict with, or authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen. . . ." Section 6 required any applicant for a federal warehouse license to post a bond to secure the performance of his obligations. Congress amended the Act in 1931, changing Section 29 so that the Secretary of Agriculture, although authorized to cooperate with State officials charged with the enforcement of state laws relating to warehouses, had exclusive power, jurisdiction and authority with respect to all persons securing a license under the Act. Congress amended Section 6 by deleting the requirement that the bond be conditioned on compliance with requirements of state law. The history and purpose of these legislative changes are discussed in *Rice* v. *Santa Fe Elevator Corp.*, 1947, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447. This case concludes that a warehouseman is not obligated to operate under the Act, but he may choose to be licensed under it; if he does, he is responsible solely under the federal act, free from the interference of state acts.

In *Rice* v. *Santa Fe Elevator Corp.*, 1947, 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447, the state regulatory agency having jurisdiction over warehouse activities brought proceedings against a federally licensed warehouseman. The warehouseman sued in the federal courts to enjoin the proceedings before the state agency and to enjoin the state attorney general from enforcing any order of the agency. In granting the injunction, the Supreme Court held that Congress had exercised its preemptive constitutional power over grain warehouses by adopting a uniform regulatory scheme to be administered by the Secretary of Agriculture. The case was decided on the issue of federal-state relations: "The test therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Id.* at 236. Since the matter is regulated by the federal act, the federal scheme of regulation

prevails; the matters involved in the suit before the State regulatory commission are beyond its reach. Congress pre-empted the field by declaring its policy in the Warehouse Act. To knock down dual regulation between state and federal systems is a far cry from saying that other federal agencies, within their proper sphere, may not exercise control or regulation along with the Secretary of Agriculture. The Rice decision does not extend the authority of the Secretary of Agriculture into matters beyond the scope of the Warehouse Act.

Cargill relies also on *Cargill Inc.* v. *Commodity Exchange Commission, et al*, 1952, U. S. D. C., 103 F. Supp. 992. In that case Cargill sued the Commission for a declaratory judgment to determine the validity of certain amended rules and regulations adopted by the Chicago Board of Trade. 7 USCA §7(a) (7), part of the Commodity Exchange Act, authorizes local boards of trade to set up reasonable warehousing requirements for warehouses whose receipts are traded at the local board of trade. The Chicago Board of Trade adopted rules requiring all persons in the Chicago area operating federally licensed warehouses to file formal application with the Board to have each such warehouse declared to be "regular" if the warehouse receipts were to be accepted on grain futures contracts. The local board's regulations went far beyond the "reasonable requirements" authorized by the Act. The district court held, properly enough, that the Act authorizing local boards of trade to set up ground rules for trading in warehouse receipts did not intend to impair the principle of exclusive federal control of the *operation* of federally licensed warehouses. Again, this is a far cry from holding that the Secretary of Agriculture's control is exclusive as against other federal agencies.

Businesses are frequently subject to regulation by several government agencies. We see nothing unusual in Cargill's being subject to the regulatory authority of the Secretary of Agriculture in its warehousing activities and

at the same time subject to the regulatory authority of the Federal Maritime Board when it furnishes maritime facilities and services. The situation would be anomalous if it were otherwise.[5]

We hold that both Cargill and the Port Commission are subject to the Shipping Act, and subject to the jurisdiction of the Federal Maritime Board.

III.

Cargill argues that Agreement 8225 was not within Section 15 of the Shipping Act. Section 15 of the Shipping Act requires persons subject to the Act to file with the Board every agreement relating to "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The term "agreement" in this section "includes understandings, conferences, and other arrangements."

The Chief Examiner of the Board was in accord with Cargill. He found that the agreement is "purely and simply a lease establishing Cargill as tenant and the Port as landlord." It seemed to the Board, and it seems to us, that the agreement "goes far beyond the usual provisions of a mere lease of property."

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[5] Baltimore and Ohio R. R. Co. v. United States, 3 Cir. 1953, 201 F. 2d 795, holds that a railroad providing maritime terminal operations is subject to regulation by both the Interstate Commerce Commission and the Federal Maritime Board, the former with respect to its full operations, the latter with respect to its maritime operations.

Under Article 10 of the original agreement Cargill agreed "to the extent economically feasible that it will give preference to this grain elevator over other grain elevators operated by [it] in the Gulf area," and that Cargill would "maintain and publish rates and charges for the handling and storage of grain upon or within the facility on a competitive basis to rates published for similar services at New Orleans and other competitive Gulf ports. . . ." In Article 17 of the agreement the Port Commission agreed that its rates for privileges and services would be competitive with rates for similar services charged at other Gulf ports, that "during the term of this lease Cargill shall have the exclusive right to operate hereunder a public grain elevator within the Port area as such area is defined by law," and that if "the Port decides to construct additional grain storage and handling facilities, Port must first offer such facilities to Cargill for operation. . . ." In its Report the Board states that "[t]hese provisions fix and regulate transportation rates or fares, give special privileges or advantages, control, regulate, prevent or destroy competition, and provide for an exclusive, preferential or cooperative working arrangement within the meaning of Section 15."

The provisions for (1) the *preference* to the Baton Rouge elevator over other elevators in the Gulf area, (2) the ***regulation of rates*** (required to be competitive with other Gulf ports), (3) Cargill's *exclusive* right to operate a grain terminal, and (4) Cargill's *first refusal* on any additional terminals, take the agreement out of the ambit of ordinary leases and place it squarely within the terms of Section 15. This is no ordinary grain elevator. It is operated at a port. Its function is to facilitate the loading and unloading of grain for vessels using the port because of its handling and storage services. It is part and parcel of an over-all scheme for the greater commercial development and use of the Baton Rouge port area. An agreement pertaining to the exclusive operation of such an eleva-

tor, dealing with preferences and rates, maritime services and facilities, has such a significant maritime connection as to fall well within the jurisdiction and scope of authority of the Federal Maritime Board.

Since the agreement comes within the terms of the Act, Board approval must be secured before the agreement can be carried out by the parties. Here, the Board approved the original agreement, finding it not unjustly discriminatory or unfair, and not detrimental to the commerce of the United States.[6] This conclusion is not contested by any of the parties. We leave it undisturbed.

IV.

Agreement 8225-1 amended Section 10 of Agreement 8225 by adding the following provision:

> "Cargill further is required to and agrees to provide and furnish stevedoring services to vessels loading or unloading at the wharf, it being recognized that vessels loading or unloading should be integrated into the overall elevator operations so as to provide efficient service, both to such vessel and to persons depositing commodities into the elevator. It is deemed to be a reasonable rule and regulation in the operation of the wharf which is part of the leased property, for Cargill to condition the loading or unloading of a vessel upon the requirement that Cargill's integrated stevedoring service be used by such vessels."

Article 10 was also amended to require Cargill to "maintain and publish rates and charges . . . in a competitive

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[6] The Board pointed out in its Report that "This exclusive lease, Agreement No. 8225, has never been approved by the Board as required by said Section 15, but has been carried out by the parties since September 7, 1955. To this extent respondents Cargill and the Port have acted unlawfully and in violation of Section 15." Even though the parties violated the statute, the Board approved the agreement. If the Board finds no cause to complain of the violation, neither do we.

basis to rates published or charged for similar services at New Orleans and other competitive Gulf ports . . . for the stevedoring of vessels loaded or unloaded at the wharf."

Section 15 of the Shipping Act authorizes the Board to disapprove, cancel or modify any agreement found to be "unjustly discriminatory or unfair" or operating to the "detriment of the commerce of the United States". 46 USCA §184. Section 17 authorizes the Board to determine, prescribe and order the enforcement of a "just and reasonable regulation or practice" whenever it finds regulations or practices established by persons subject to the Act to be "unjust or unreasonable." 46 USCA §816. The Board's decision in the instant case applied both of these sections. After considering Agreement 8225-1, the Board refused to approve it, holding that Agreement 8225-1 resulted in a monopoly of stevedoring services detrimental to the commerce of the United States. See *Baker Whiteley Coat Co.* v. *Baltimore & O. R. Co.*, 4 Cir., 1911, 188 Fed. 405; *Donovan* v. *Pennsylvania Co.*, 1905, 199 U. S. 279, 26 S. Ct. 91, 50 L. Ed. 192. See also *Isbrandtsen Co.* v. *United States*, D. C. Cir., 1954, 211 F. 2d 51; *McLean Trucking Co.* v. *United States*, 1944, 321 U. S. 67, 87, 64 S. Ct. 370, 88 L. Ed. 544.

The Port Commission and Cargill contend that Agreement 8225-1 does not come within the purview of Section 15 of the Shipping Act, and that these provisions merely represent the exercise of the free right of managerial judgment by the Commission as owner and Cargill as operator of the property. But if Agreement 8225 comes within Section 15, as we have held, then *a fortiori* Agreement No. 8225-1, which broadens the lease to include stevedores—clearly a maritime concern—comes within Section 15.

Stevedoring is traditionally maritime. Stevedoring of grain requires a close relation between the stevedore and the vessel, a careful inspection of the ship, a sound plan of stowage, and skillful execution of the plan. There is a complete separation between the function of the elevator in delivering the grain and the function of a vessel in receiv-

ing it. There is no physical connection between vessel and elevator except guide lines to hold the spout discharging grain into a hatch. The elevator workers perform no services on the vessel; the longshoremen perform no services in the elevator or on the wharf.

Accordingly, under Section 15, we find that Agreement 8225-1 must also be approved by the Board in order for it to become effective.

V.

The Board's decision was reached after a full hearing, including submission of briefs and oral argument. The Board was set up by Congress to determine questions of fact and make administrative orders on the basis of its informed judgment and discretion. If the Board's order is supported by sufficient evidence considering the record as a whole, and if the order has a reasonable basis in law, this Court will not disturb it.[7]

In spite of the fact that the ship's master is legally responsible for the proper loading and seaworthiness of the vessel, Agreement 8225-1 would prohibit the vessel from participating in the selection of its stevedore. The Agreement would make the Baton Rouge elevator the only one of nine elevators in the Gulf area not "open" to stevedores. Cargill asserts that the agreement will result in a "more efficient and economical over-all operation." Efficiency is not enough. It is not a cure-all. Not in our system of law.

Cargill and the Port Commission assert that the exclusive stevedoring contract enabled the Port Commission to secure favorable rental payments which are necessary in

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[7] This principle is firmly established, beyond the realm of contestation. See 4 Davis, Administrative Law, §§29.01-30.14; Federal Maritime Board v. Isbrandtsen Co., 1958, 356 U. S. 481, 2 L. Ed. 2d 926, 78 S. Ct. 851; Swift & Co. v. United States, 1952, 343 U. S. 373, 96 L. Ed. 1008, 72 S. Ct. 716; U. S. Nav. Co. v. Cunard S. S. Co., 1932, 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408; Manufacturers R. Co. v. United States, 1918, 246 U. S. 457, 38 S. Ct. 383, 62 L. Ed. 831; Pennsylvania Co. v. United States, 1915, 236 U. S. 351, 35 S. Ct. 370, 59 L. Ed. 616.

order for the Commission to finance its operations, the Commission having no power to tax and not having the benefit of taxes being dedicated to it. La. Const. of 1921, Art. VI, Section 29. Monopolies secure economic advantages. They are expected. But if economic advantages are factors to be considered at all, they are to be weighed and evaluated by the Federal Maritime Board. Not by us in our appellate role.

The record does not justify Cargill's high opinion of its stevedoring activities. Over 80% of the vessels free to select the stevedore chose BARMA rather than Rogers, Cargill's affiliate. The average hourly tonnage loaded by BARMA has substantially exceeded that of Rogers, before and after the exclusive arrangement.[8] The record shows that the stevedoring services and efficiency of BARMA steadily improved and are in some cases superior to Rogers' services. BARMA has held on to half of the grain stevedoring business at Baton Rouge even though Cargill's affiliates have appointed Rogers as stevedore.

Cargill argues that its legal obligation to provide stevedoring services in accordance with specified standards, thereby protecting vessel owners and operators against unreasonable charges for stevedoring, removes any possibility that the amendment could be detrimental to commerce or in any way conflict with Section 17 of the Act. No matter how desirable an agreement may appear, no matter how beneficent the monopoly may appear, Congress has commanded that agreements limiting or destroying competition must first be approved by the Board before they may be lawfully carried out. National policy favors free and healthy competition; monopoly is the exception. Here, to rely on the agreement's alleged built-in safeguards, pre-

[8] Rogers loaded 262.5 tons per hour in 1956, when it began operations; 326.3 tons per hour in 1957; and 259.4 tons per hour in the first quarter of 1958. BARMA, on the other hand, has increased its rate of loading from 364.7 to 445.9 to 510.6 tons per hour in the same periods. BARMA loaded an average of 40% more grain per hour than Rogers at the date of the hearing, April 1958.

venting harmful effects of a monopoly, is to fail to look at the total picture. It would take away, too, the Board's function and arrogate it to us. This we will not do if there is a reasonable basis for the Board's decision. On the record, as we read it, there is a rational foundation in law and in fact for the Board's conclusion that Agreement 8225-1 would be unjustly discriminatory, unfair, and unreasonable, and therefore detrimental to commerce in the United States.

We summarize. Cargill is subject to the jurisdiction of the Federal Maritime Board, whether or not it is also licensed as a warehouseman by the Secretary of Agriculture. The exclusive lease arrangement embodied in Agreement 8225 between Cargill and the Port Commission is within the scope of Section 15 of the Shipping Act. The Board properly approved it. The restrictive stevedoring arrangement in Agreement 8225-1 is also within the scope of Section 15. Under Section 17, the Board properly found that Agreement 8225-1 violates the standards established in the Shipping Act.

There being no legal basis for setting aside or modifying the order of the Board, the petition is denied.

APPENDIX B.

Report and Order of Federal Maritime Board.

FEDERAL MARITIME BOARD

S E R V E D
AUGUST 14, 1959
FEDERAL MARITIME BOARD

No. 830

AGREEMENTS NOS. 8225 AND 8225-1, BETWEEN GREATER BATON ROUGE PORT COMMISSION AND CARGILL, INC.

Submitted: June 23, 1959 Decided: August 6, 1959

Agreement No. 8225 between respondent Port and its lessee, respondent Cargill, leasing Port's grain elevator to lessee to operate as a public terminal facility, and under which lessee is granted certain exclusive and preferential rights, found subject to the filing and approval requirements of section 15 of the Shipping Act, 1916.

Respondents have effectuated Agreement No. 8225 prior to filing with and approval by the Board in violation of section 15 of the Shipping Act, 1916.

Agreement No. 8225 found not unjustly discriminatory or unfair or detrimental to the commerce of the United States, or in violation of the Shipping Act, 1916, and approved by the Board.

Agreement No. 8225-1, a modification of Agreement No. 8225, creating a monopoly in grain stevedoring in respondent Cargill, would operate to the detriment of the commerce of the United States, and would be an unjust and unreasonable practice related to the receiving,

handling, and storing of property in violation of section 17 of the Shipping Act, 1916. Said agreement not approved by the Board.

George Mathews and Theo. F. Cangelosi for respondent Greater Baton Rouge Port Commission.

Weston B. Grimes and Samuel D. Timmons for respondent Cargill, Inc.

Walter Carroll for intervenor Baton Rouge Marine Contractors, Inc.

Robert E. Mitchell, Edward Aptaker and Robert T. Hood, Jr. as Public Counsel.

Report of the Board.

(Clarence G. Morse, Chairman; Ben H. Guill, Vice Chairman; Thos. E. Stakem, Jr., Member)

This proceeding is an investigation instituted on the Board's own motion to determine whether Agreement No. 8225 and/or the amendment thereto, Agreement 8225-1, between respondents Greater Baton Rouge Port Commission (Port), an agency of the state of Louisiana, and Cargill, Inc. (Cargill), has been carried out prior to approval by the Board in violation of section 15 of the Shipping Act, 1916 (46 U. S. C. 814), and whether operation under said agreements would otherwise result in violations of section 16, First, or 17 of the Act (46 U. S. C. 815 and 816), or would contravene any of the standards of said section 15.[1] Notice of these two agreements was published in the Federal Register on May 25, 1957, 22 F. R. 3713, and a protest was filed by Baton Rouge Marine Contractor, Inc. (BARMA).

Hearings were held before an examiner of the Board, briefs were filed, and the Chief Examiner issued his recommended decision on February 3, 1959.

[1] Pertinent portions of sections 15, 16 and 17 of the 1916 Act are attached as Appendix A hereto.

The recommended decision concluded and found that:

1. Agreement No. 8225, leasing the port's grain elevator to lessee, was not subject to the filing and approval requirements of section 15 of the Act.

2. Even if the lease agreement were subject to the requirements of section 15, it was not shown that the agreement contravened section 15 in any respect, and approval should be granted if required.

3. The lease agreement as modified by Agreement No. 8225-1, giving lessee exclusive right to stevedore vessels loading grain at the terminal, was subject to section 15 of the Act and resulted in unreasonable regulations and practices in violation of section 17 of the Act and was detrimental to commerce under the standards of section 15 of the Act.

Exceptions to the recommended decision and replies thereto were filed and oral argument has been heard by the Board. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding.

Facts.

Agreement No. 8225, dated September 7, 1955, is a lease from the Port to Cargill of the Port's grain elevator and wharf for 20 years with option for renewal for another 20-year term. Article 10 thereof stipulated that the facilities shall be maintained as public port facilities; that the:

> "lessee further agrees to the extent economically feasible that it will give preference to this grain elevator over other grain elevators operated by lessee in the Gulf area";

and that:

> "lessee is to maintain and publish rates and charges for the handling and storage of grain upon

> or within the facility on a competitive basis to rates published for similar services at New Orleans and other competitive Gulf ports . . ."

Article 17 provides in part that:

> "The lessor agrees that its rates for any and all privileges and services shall be competitive with, and not greater than, rates for similar services and privileges charged at other Gulf ports . . .";

and that:

> "during the term of this lease Cargill shall have the exclusive right to operate hereunder a public grain elevator within the Port Area as such area is defined by law";

and that if:

> "the Port decides to construct additional grain storage and handling facilities, Port must first offer such facilities to Cargill for operation. . . ."[2]

Agreement No. 8225-1, dated March 22, 1957, amended Article 10 of Agreement No. 8225, and provides that Cargill will render stevedoring services exclusively, at rates competitive with New Orleans and other competitive Gulf ports. Both agreements were filed with the Board on April 25, 1957, for approval, if required, under section 15 of the Act.

Cargill is licensed by the Department of Agriculture (Agriculture) in accordance with the United States Warehouse Act (7 U. S. C. A. 241, *et seq.*) to conduct the grain elevator, which is described in the license as consisting of tanks, bins, etc., located between Louisiana Highway No. 1 and the levee of the Mississippi River one mile south of Port Allen, La. Not mentioned are the wharf, loading galleries, chutes and other paraphernalia used in the deliv-

[2] The grain elevator is financed by the Port with money received as rent from Cargill.

ery of grain to vessels, which installations are located on the river side of the levee in the river itself and outside the area described in the license. Cargill, referred to as "warehousemen," is authorized to store not in excess of 2,800,000 bushels at any one time.

Agreement No. 8225-1 and a schedule of charges for receiving, unloading, handling, storing, delivering, loading and stevedoring has been filed by Cargill with Agriculture. The rates were accepted and the agreement was not disapproved.[3] The licensing by and filing with Agriculture are relied upon by Cargill in support of its contention that the primary regulatory authority over its activities rests with Agriculture and not with the Board.

Certain preliminary functions are performed by the stevedore before the ship goes to the elevator. For instance, he must know the capacity of each compartment; the terms of the charter party and the kinds of grain involved; the overtime provisions, and apply them in the best interest of the ship owner; and the ship's condition as to grain fittings and must install or repair them as needed. The ship must be "laid out" and the stowage carefully planned with due respect to proper draft and distribution, as well as the discharge of grain in the several ports in the proper rotation. Also, he must cooperate with the various inspection services to obtain the proper authorization before loading.

The loading of grain vessels requires skill and judgment to assure the ship's seaworthiness. The relation between vessel and stevedore involves trust, reliance and dependence on the skill, reliability and efficiency of the stevedore in the performance of an important ship operating function. Under the form of grain charter used in the Gulf, including Baton Rouge, the vessel owner appoints the stevedore, except where by special charter provision the right of appointing is given the charterer. In all instances the decision on all matters of loading rests with the master, and the

[3] There is no showing of record that the Warehouse Act or the rules and regulations thereunder require the filing with Agriculture of stevedoring rates or the lease agreements.

vessel and her owners are legally and contractually responsible for the proper loading and seaworthiness of the vessel and they pay the cost of loading.

There is a complete separation of the function of the elevator in delivering grain and that of the vessel in receiving and stowing it. There is no physical connection between vessel and elevator except mooring and guide lines. The latter hold the spout which discharges the grain into the hatch under control of the stevedore. The elevator has completed delivery when the grain flows out of the spout. All remaining functions are those of the stevedore who in effect takes over the ship's operation for the time being.[4] The elevator personnel perform no function on the vessel; the stevedore personnel perform no services in the elevator or on the wharf. There is of course necessity for cooperation between the two groups, as the stevedores must signal terminal personnel in order to control the flow of grain.

The Port commenced operations as a newly expanded general cargo and grain port with the opening of the grain elevator in September, 1955. Cargill promulgated "Tariff No. One," effective July 1, 1955, embodying charges for storage, receipt and delivery of grain, but not for berthing and loading of ships. Later, rates for berthing and loading of vessels were published in "Vessel Tariff No. One," effective October 4, 1955, which gave preference to ocean liners for berthing.[5]

In the meantime, four Gulf stevedoring firms[6]—with the encouragement of the Port and Cargill, and with the advice

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[4] As grain is dropped into the ship, samples thereof are taken to a laboratory licensed by Agriculture for inspection to determine its quality. The elevator must correct any mistakes resulting from delivery of the wrong grade or type of grain through the spout.

[5] This tariff was superseded by a similar tariff—"Vessel Tariff No. Two," effective October 1, 1957.

[6] Texas Transport and Terminal Corp., Atlantic & Gulf Stevedores, Inc., Strachan Shipping Co., and T. Smith & Son, Inc., which serve Gulf ports generally, and perform approximately 75 percent of grain stevedoring at New Orleans. These companies designate BARMA as Baton Rouge agent for all vessels represented by them in New Orleans.

from Cargill that the elevator would be "open" to stevedores and not operated on an exclusive basis, and that the stevedore would have to deal directly with the vessel—organized BARMA to supply agency and stevedoring services, particularly on grain, at Baton Rouge. Previously, these firms had solicited and sought from Cargill (unsuccessfully) an exclusive stevedoring agreement, but finally decided to organize a joint company in view of the substantial capital investment required for trimming machines. BARMA purchased equipment, including grain trimming machines, opened and staffed an office in Baton Rouge and commenced procuring supervisory personnel and labor, most of which had to be trained. Because of this and difficulties encountered with the new elevator, which has only one delivery belt, efficiency and turnaround of vessels was not up to par beginning with loading of the first grain vessel in September, 1955. By spring of 1956, however, after many meetings between Cargill and BARMA relative to means of improvement, efficiency was improved and compared favorably with other Gulf operators having only one delivery belt. Due to inexperienced labor, plus the unknown quantities involved in handling the new grain facilities, BARMA's original stevedoring rates were fixed somewhat higher than at New Orleans. They are still slightly higher although the labor rate per hour at Baton Rouge has been lower than at New Orleans.

In August, 1956, after renewing complaints to BARMA about dispatch,[7] Cargill brought into Baton Rouge its

[7] Cargill's elevator superintendent testified that at a meeting on August 9, 1956, he complained to BARMA's officials about the efficiency of its superintendent. This, the officials could not recall. Cargill's superintendent also testified as to other complaints, but he could recall only one instance of what he termed a lack of cooperation which was explained by BARMA's general manager as due to the orders of the master of the vessel. At this meeting BARMA presented data to Cargill showing that dispatch and turnaround at Baton Rouge compared very favorably with that at New Orleans and other Gulf ports as to vessels handling only one grade or type of grain. Neither Cargill nor the Port made any complaints in writing.

wholly owned subsidiary, Rogers Terminal and Shipping Corporation (Rogers), and advised BARMA that it was no longer welcome at the elevator, and that thereafter all the grain stevedoring would be done by Rogers. BARMA refused to withdraw and in March, 1957, respondents, without notice to BARMA, entered into the exclusive stevedoring arrangement by execution of Agreement 8225-1. The Port made no inquiry as to how Cargill would conduct the stevedoring operation. After this arrangement the Baton Rouge elevator was the only one of nine elevators in the Gulf area not "open" to stevedores.

The reason given for the amended agreement is that the loading of vessels may be:

> "integrated into the over-all elevator operation so as to provide a more efficient service."

However, the performance records indicate that the average hourly tonnage loaded by BARMA has exceeded that of Rogers by a substantial percentage, both before and after the exclusive arrangement. Rogers hired away from BARMA some of its key supervisory personnel. Both use the same type of equipment, and same union labor force, and pay the same wages. Their stevedoring rates are the same except for such discount as is given by BARMA for an annual contract with the shipowner.

Since the advent of Rogers, Cargill's affiliates[8] have appointed it as stevedore. However, BARMA has been able to hold on to half of the grain stevedoring business at Baton Rouge, and 80-85 percent of business on vessels having the right to select the stevedore. It is in a sound financial position, but its vice-president testified that the loss of grain business, which provides its largest income, would probably force it to go out of business.

In Docket 785—*D. J. Roach, Inc.* v. *Albany Port District et al.*, 5 F. M. B. 333 (1957), the Board decided, on October 21, 1957, that the Warehouse Act relates to the storage of

[8] By itself or through affiliates, Cargill is a substantial charterer of grain vessels.

grain as opposed to its movement, and that it does not limit the jurisdiction of the Board over Cargill's activities at Albany, N. Y., as an "other person subject to the act." Soon thereafter, Cargill at Baton Rouge promulgated "Tariff No. Two," effective November 7, 1957, which superseded both its tariff covering storage, etc. (Tariff No. One) and its tariff covering berthing and loading (Vessel Tariff No. Two) which had been in effect only since October 1, 1957. (See Footnote 5). The new tariff, which as stated was filed with Agriculture, combines into one document the hitherto separate elements of its two predecessors — storage of grain and berthing and loading of vessels. It publishes for the first time rates for stevedoring services, and provides for vessel owner's application for, and Cargill's approval of berth occupancy, which constitutes a contract between them to abide by the terms of the tariff. Like its predecessor, the new tariff provides that ocean liners shall be given preference. The elevator is open to both common and contract carriers. No change in practice resulted from publishing Tariff No. Two. Cargill has not required the exclusive use of its stevedoring service, or charged the stevedoring rates in Tariff No. Two, or required signed applications for berthing service. Thus it appears that Agreement 8225-1 has not been carried out prior to approval by the Board.

We first conclude as did the Chief examiner that the fact that Cargill's grain storage activities are regulated by the Secretary of Agriculture under the United States Warehouse Act, 7 U. S. C. 241, in no way limits our jurisdiction over Cargill's terminal activities under the Shipping Act. *D. J. Roach, Inc.* v. *Albany Port District, et al., supra.*

Cargill operates terminal facilities in Baton Rouge and in other areas, and is clearly an "other person" subject to the 1916 Act. The Port operates a public general cargo dock and admits that it is an "other person," subject to the Act, and we find that the agreements here involved are between such "other persons."

If agreement No. 8225 and amendment thereto, Agreement No. 8225-1, are agreements in any way,

> ". . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement,"

then section 15 of the Act requires filing with and approval by the Board before such agreement may be carried out.

We consider first the original lease, Agreement No. 8225.

Cargill urges, and the Chief Examiner found, that this agreement was purely and simply a lease establishing Cargill as a tenant and the Port as a landlord; that it did not limit and restrain competition between the parties; and that it did not fix rates, or prevent, destroy, etc., competition, or constitute a working arrangement within the meaning of section 15.

With this we cannot agree.

Agreement No. 8225 goes far beyond the usual provisions of a mere lease of property. Article 10 recognizes that Cargill operates other grain elevator facilities in the Gulf area, and provides that Cargill will prefer the Baton Rouge facility over such other facilities in the Gulf area. Section 17 provides that Cargill will maintain rates competitive with but not greater than rates at other Gulf ports; that Cargill has the exclusive right to operate the terminal for up to 40 years; and that if the Port should construct additional grain facilities, such facilities would be first offered to Cargill for operation.

These provisions fix and regulate transportation rates or fares, give special privileges or advantages, control, regulate, prevent or destroy competition, and provide for an

exclusive, preferential or cooperative working arrangement within the meaning of section 15. This exclusive lease, Agreement No. 8225, has never been approved by the Board as required by said section 15, but has been carried out by the parties since September 7, 1955. To this extent respondents Cargill and the Port have acted unlawfully and in violation of section 15.

We find nothing in the record, however, which indicates that Agreement No. 8225 is in any way unjustly discriminatory or unfair or detrimental to the commerce of the United States, or in violation of the Shipping Act. Publication of Notice of Agreement No. 8225 in the Federal Register on May 25, 1957, elicited no protest other than that of BARMA, which was primarily directed to the subject matter of the amendment, Agreement No. 8225-1. In view of the foregoing, we will approve Agreement No. 8225.

We next consider whether the modification of the lease agreement, Agreement No. 8225-1 requires approval under section 15, and if so, whether such approval should be granted.

Agreement No. 8225-1 is clearly within the coverage of section 15 of the Act. It is between "other persons" subject to the Act and provides that Cargill will render stevedoring services exclusively at the grain terminal here involved. This modification of the lease agreement controls and regulates competition, and requires approval by the Board under section 15 before it may be carried out. It is apparent from the record that this Agreement No. 8225-1 has not been carried out by the parties without approval in violation of section 15.

The clear purpose and intent of Agreement No. 8225-1 is to vest in Cargill the exclusive right to provide stevedoring at this grain terminal in Baton Rouge. The effectuation of this monopoly would result in all the grain trimming on vessels using this grain terminal being done by Cargill's wholly owned subsidiary Rogers, while neither BARMA nor any other stevedore could provide such service. Vessels using the grain facility would be foreclosed from

choosing any stevedore except Rogers to trim grain as it is loaded in the vessel.

The particular operation performed by the stevedores at this grain elevator involves merely the trimming of the grain in the vessel, and none of the stevedore activity here in issue involves the use of any of the property or facilities of the terminal. Responsibility for the proper loading and seaworthiness of the vessel rests with the master, and to permit the Port and Cargill to prohibit the vessel from participation in the selection of a stevedore would require strong justification.

We do not consider the justification advanced by Cargill and the Port to be persuasive. The record does not show that a monopoly of stevedoring in Cargill's subsidiary, Rogers, will improve the efficiency of the grain terminal but shows that the stevedoring provided by BARMA has gradually improved its service, and in fact has evidenced some superiority over Rogers.

In view of the foregoing, and the further fact that Agreement No. 8225-1 would create in Cargill a monopoly over activities which take place exclusively on the vessel and not on terminal property, we conclude that Agreement No. 8225-1 would be detrimental to the commerce of the United States, and would be an unjust and unreasonable practice related to the receiving, handling, and storing of property, in violation of section 17 of the Shipping Act, 1916. We shall not approve said Agreement No. 8225-1.

This conclusion is not in conflict with our decision in the *Roach Case, supra.* In that proceeding there was no showing that Cargill had been granted an exclusive stevedoring right by the Albany lease, and the issue involved was the right of Cargill, where it had entered into a stevedoring contract with the vessel, to appoint a sub-agent of its own choosing.

An appropriate order will be entered.

GEO. A. VIEHMANN
Assistant Secretary

Appendix A.

SECTION 15, Shipping Act, 1916:

"That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports, limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

"The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board shall be lawful until disap-

proved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

"All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation." • • •

SECTION 16, Shipping Act, 1916:

• • • "That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." • • •

SECTION 17, Shipping Act, 1916:

• • • "every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Order.

At a Session of the Federal Maritime Board,
held at its Office in Washington, D. C.,
on the 6th day of August A. D. 1959

No. 830

Agreements Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc.

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is Ordered, That Agreement No. 8225 be, and it is hereby, approved, and

It is Further Ordered, That Agreement No. 8225-1 not be approved, and

It is Further Ordered, That this proceeding be, and it is hereby, discontinued.

By the Board.

Geo. A. Viehmann
Assistant Secretary

APPENDIX C.

Judgment Below.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 18006.

GREATER BATON ROUGE PORT COMMISSION and CARGILL, INCORPORATED,

Petitioners,

versus

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

Petition to Review Report and Order of the Federal Maritime Board.

Before TUTTLE, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

Judgment.

This cause came on to be heard on the petition of Greater Baton Rouge Port Commission, and Cargill, Incorporated, to review a Report and Order of the Federal Maritime Board issued on August 14, 1959 in Docket No. 830, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the petition to review in this cause be, and the same is hereby, denied.

February 7, 1961.

APPENDIX D.

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 18006.

GREATER BATON ROUGE PORT COMMISSION and CARGILL, INCORPORATED,

Petitioners,

versus

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

Petition to Review Report and Order of the Federal Maritime Board.

On Petition for Rehearing.

Before TUTTLE, Chief Judge, and CAMERON and WISDOM, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing filed in the above styled and number cause be, and the same is hereby,

DENIED without prejudice to the petitioners' right, if any, to request mitigation of any penalty for which they may be liable.

September 14, 1961.

APPENDIX E.

Statutes Involved.

SHIPPING ACT, 1916

(46 U. S. C. A. 801 *et seq.*)

SECTION 1. That when used in this Act:

* * * * * *

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

* * * * * *

SEC. 15.[1] That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrange-

[1] The Section is quoted as it read prior to amendment by Public Law 87-346 October 3, 1961, which amendment is not pertinent hereto except that the penalty provided is now "not more than $1,000 for each day."

ment. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.